In the

Supreme Court of the United States

October Term, 1978

No. 78-752

T. L. BAKER,

Petitioner,

v.

LINNIE CARL MCCOLLAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is officially recorded in volume 575 F.2d 509 (1978) and is set forth in the appendix, pp. 17-23.[1]

JURISDICTION

The judgment of the court below (A.17-23) was entered on June 19, 1978. A timely petition for a rehearing was denied on August 10, 1978. The petition for writ of certiorari was filed on November 6, 1978 and was granted on January 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Hereafter, the separately bound appendix to the brief shall be referred to as "A". References to portions of the transcript of proceedings not in the appendix shall be indicated "Tr.".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States:

Section 1 of the fourteenth amendment to the Constitution provides in pertinent part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. United States Code:

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

1. Whether a failure to have established administrative procedures which might have secured the release of Respondent is actionable under 42 U.S.C. § 1983 absent intent to injure, knowledge of facts requiring action or deliberate indifference to consequences of inaction when the Respondent was arrested and confined in good faith reliance on a valid warrant.

2. Whether, as a matter of law, the Sheriff should be entitled to qualified immunity from claims made under

42 U.S.C. § 1983 when the good faith of the Sheriff is conceded and the reasonableness of the arrest and confinement is supported by a validly issued warrant in the name of Respondent.

3. Whether an official "causes or subjects" one to a deprivation of his rights merely because he has failed through simple negligence to institute a procedure to uncover mistakes of others which were the causes, in fact, of the deprivation.

STATEMENT OF THE CASE

Petitioner T. L. Baker became Sheriff of Potter County on November 20, 1972 (A. 24) following the death of his predecessor (A. 54). At the time he became Sheriff, there was an outstanding warrant for the arrest of one "Linnie Carl McCollan" dated November 3, 1972 (A. 118, P. Ex. 7, admitted Tr. 103). On December 26, 1972 the Potter County Sheriff's Department was notified that the said "Linnie Carl McCollan" was being held by the Dallas Police Department, and on December 30, 1972 a deputy was dispatched to return the prisoner on the warrant (A. 42, 43). Respondent was brought to the Potter County jail on December 30, 1972 and held there until released on January 2, 1973 (A. 44, 45).

Petitioner Baker was not keeping regular office hours during the holiday period of December 30, 1972 through January 1, 1973 (A. 64). Though he was in contact with the personnel at his office during the period, he had no actual knowledge concerning the confinement of Respondent until January 2, 1973 (A. 64, 65). Upon being notified for the first time on January 2, 1973 that Respondent was claiming not to be the person sought by the warrant, Petitioner Baker investigated and determined that the warrant

should have been issued for "Leonard McCollan" and ordered Respondent released (A. 65, 66).

Petitioner Baker learned at the time of releasing Respondent that a person was previously arrested as "Linnie Carl McCollan" but was, in fact, Leonard McCollan, a brother of Respondent (A. 61-63, 112, 113). Leonard McCollan had, at the time of his arrest, exhibited a driver's license describing Respondent and with Respondent's name and driver's license number thereon (A. 60-63). The date of birth and other description taken from the driver's license exhibited by Leonard McCollan was used to identify Respondent at the time of his arrest and was identical to the information contained on Respondent's then current driver's license (A. 95, 106, 111, D. Ex. 13, admitted Tr. 241).

Petitioner Baker's first actual knowledge that Respondent claimed not to be the person sought came on January 2, 1973, six days after the arrest and three days after his transfer to Potter County. Upon learning that Respondent claimed that the warrant should have been for his brother, Petitioner Baker investigated and acted immediately to secure the release of Respondent (A. 65, 66, 113). Following the incident, Respondent Baker inaugurated a policy requiring deputies picking up prisoners in other jurisdictions to take with them available mug shots and fingerprint records (A. 52). At the time of the arrest of Respondent such a policy either did not exist or was not being followed (A. 52, 53).

Respondent went to trial on his Second Amended Complaint in the United States District Court for the Northern District of Texas seeking to recover under 42 U.S.C. § 1983 for false arrest and false imprisonment against the arresting police officer, the Dallas Chief of Police, Sheriff T. L.

Baker and his surety Transamerica Insurance Company (A. 6). Prior to trial the arresting officer and the Dallas Chief of Police were dismissed from the suit (A. 15). After full trial on the merits, the trial court granted Petitioner's motion for directed verdict (A. 11) and dismissed Petitioner and Transamerica Insurance Company from the case (A. 15). The court of appeals reversed and remanded for a new trial (Opinion, A. 17). A petition for rehearing was denied on August 10, 1978. A petition for certiorari was filed herein on November 6, 1978 and granted on January 15, 1979.

SUMMARY OF ARGUMENT

The Fifth Circuit, reviewing a directed verdict, found that a fact issue was raised concerning the Constitutional validity of Respondent's arrest and subsequent confinement for six days notwithstanding that he was arrested and confined in reliance on a warrant naming him and that he was identified by means extraneous to the warrant as the person sought. In so holding, the court below creates a new due process requirement for arrest and confinement. A valid warrant is no longer sufficient; rather, the officers arresting and confining must use the highest standard of care in identifying the person to be arrested and confined or the warrant will not fulfill the requirements of due process.

The court below further erred by equating the general intent to "arrest and confine" with "intent to arrest and confine *without a warrant*." This error was compounded by attributing the intent and conduct to Petitioner though he neither participated, had knowledge of nor in any way acquiesced in the conduct.

Even assuming a recognized federal right was involved, there was no proof of conduct which could amount to anything more than simple negligence. Yet, without directly

speaking to the issue, this Court has consistently required something more than simple negligence to support a cause of action under § 1983.

Under accepted standards of proof, the evidence did not raise any issue of simple negligence. The fact of the occurrence and Petitioner's remedial acts to prevent recurrence are not, and should not have been considered, evidence that his failure to have previously instituted such remedial acts was negligent or was a legal cause of injury to Respondent.

ARGUMENT

I

An action under 42 U.S.C. § 1983 must be based upon conduct of the Defendant causing a deprivation of a protected right.

An action asserted under 42 U.S.C. § 1983 must arise from a deprivation of an identifiable, clearly established right secured by the United States Constitution. Accordingly, the threshold consideration is whether Petitioner in the first instance has posed a Constitutional right as the underpinning of his § 1983 action; absent such a showing, recourse to § 1983 is not available.[2]

The cornerstone of Respondent's § 1983 action is that Petitioner transgressed Respondent's "right" protected by the fourteenth amendment to be free from confinement without "due process of law". The fundamental inquiry is thus whether "due process of law" embodies an absolute requirement that an arrest effected pursuant to a warrant be error-free. An arrest fulfills due process requirements only if it stems from probable cause or a valid warrant. However, due process requirements have never been extended to demand the most effective possible means

[2] *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24 (1978); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976).

of ascertaining identity in order to have a Constitutionally correct arrest and confinement.

A. Respondent was not deprived of liberty "without due process of law" when arrested pursuant to a warrant valid on its face.

Sheriff Baker's investigation, which was prompted by Respondent's protestations of mistaken identity, confirmed that the warrant should have directed the arrest of Respondent's brother, Leonard McCollan, rather than Respondent, Linnie Carl McCollan. Nevertheless, a warrant had been issued for Linnie Carl McCollan and unquestionably Petitioner had no part in the issuance of the warrant.[3] No question is raised concerning the validity of the warrant. It is also unquestioned that Respondent identified himself as Linnie Carl McCollan and that his driver's license reflected the same birth date and license number as the person previously arrested and for whom the warrant should have been issued.

Generally, an arrest and confinement of a person pursuant to a warrant valid on its face will not support an action under 42 U.S.C. § 1983.[4] The officials executing the warrant will be protected even though the evidence is clear that the warrant should not have been issued for the person arrested.[5] The reasoning of the cases appears to be that the arrest and confinement pursuant to a warrant is not a violation of "due process" because there is no duty to inquire concerning the facts causing the warrant to have

[3] The Fifth Circuit noted, consistent with the evidence, that Sheriff Baker could not be responsible for any failure in connection with the issuance of the warrant because he did not take office until after the warrant had been issued. Footnote 4 of opinion below, A. 21.

[4] *Perry v. Jones*, 506 F.2d 778 (5th Cir. 1975); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954).

[5] *Perry v. Jones*, 506 F.2d 778, 780 (5th Cir. 1975).

been issued. Thus, in these cases there is no deprivation of rights so long as the officer arresting and confining the complaining party was not responsible for the issuance of the warrant.[6]

In the instant case the warrant was unquestionably valid because it fulfilled all governing legal prerequisites. Rather, the court below discarded the warrant as irrelevant by concluding that because it should have been issued for Respondent's brother, Leonard, it conferred no authority to arrest Respondent, notwithstanding that it described him.

The evidence is uncontroverted on this point. Thus the court's conclusion that Respondent was not the man wanted by the warrant is merely a matter of characterization and is certainly open to question. It is logical to conclude that the error was the failure to name Leonard McCollan in the warrant, and that the warrant directed the arrest of Respondent. The court below dismisses this approach by reasoning that this would be tantamount to authorizing a sheriff with a warrant for John Smith to arrest anyone with that name. Yet those were not the facts of this case. Here, a warrant was issued for Linnie Carl McCollan. Respondent identified himself as that man, not only by name but by a driver's license bearing an identical number and date of birth to that of the man sought.[7]

[6] Where the arresting officer is responsible for causing an improper warrant to issue, it is that conduct and not the arrest and confinement that should be quesioned. *Cf. Rodriguez v. Ritchey*, 539 F.2d 394 (5th Cir. 1976) where the court considered actionable the conduct of officers causing a warrant to issue erroneously but exonerated the arresting officers who were not parties to the error.

[7] In *Perry v. Jones*, 506 F.2d 778 (5th Cir. 1975) the court went so far as to create a duty to arrest under certain circumstances. The court said:

> "When Appellant identified himself to deputies holding a warrant for his arrest, their duty was to arrest him, *Greenwell v. United States*, 1964, 119 U.S. App. D.C. 43, 336 F.2d 962, cert. denied, 380 U.S. 923, 85 S.Ct. 921, 13 L.Ed.2d 807." *Id.* at 780.

Even if the warrant is characterized as being for another person, it nevertheless was a valid warrant in the name of Respondent and should have bearing on whether Respondent's deprivation of liberty was without due process of law. Clearly the guilt or innocence of the person arrested has no bearing on the validity of the arrest and confinement. As the Fifth Circuit stated in *Perry v. Jones*:[8]

> "A police officer who arrests someone with probable cause or a valid warrant is not liable for false arrest simply because the innocence of the suspect is later established."[9]

The same rule should apply to the warrant before the Court.[10] Respondent was identified by evidence extraneous to the warrant as the person named in the warrant. This is not the case of a "John Smith" where an arresting officer would arguably be charged with knowledge that there were many John Smiths. Even there, however, the officer should be protected by the warrant if the person arrested is identified as "the John Smith" by evidence other than use of a common name.

If this Court is uncomfortable with the characterization of the warrant as fulfilling due process for the arrest of Respondent, the warrant nevertheless should supply, under these facts, the elements establishing qualified immunity as a matter of law. Such was the conclusion of the court in *Atkins v. Lanning*,[11] which examined a similar situation and concluded that "the arresting officer is entitled to the qualified immunity defense of a good faith belief that his be-

[8] 506 F.2d 778 (5th Cir. 1975).

[9] *Id.* at 780.

[10] *Cf. Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977).

[11] *Id.* at 487.

havior was proper."[12] The same result should have followed here where there was no evidence that Petitioner or his deputies acted other than in the good faith belief that their behavior was proper in executing a valid warrant.

B. Petitioner did not intend to confine or act to confine Respondent merely because he authorized his deputies to execute a valid warrant.

Assuming, *arguendo*, that the good faith reliance of Petitioner on the warrant did not insulate him from liability under § 1983, the court below recognized that Respondent, nevertheless, had to present certain minimum proof to establish a cause of action. The court below suggested two hypotheses for concluding that the evidence created a fact issue requiring submission to the jury. Under the first, the court concluded that Respondent established a prima facie case by showing:

> "(1) Intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm."[13]

The second hypothesis, fully discussed hereafter, was that Respondent established a prima facie case by showing that Petitioner may have caused the confinement through negligence.

Assuming the court below is correct in describing the elements of a false imprisonment case asserted under § 1983

[12] *Id.* In *Atkins v. Lanning*, a warrant was mistakenly issued for "Timothy Adkins" and based thereon one Timothy Dale Atkins was arrested and confined for thirty-three days before the mistake was discovered. The arresting officer played no part in causing the warrant to have been issued, and notwithstanding the difference in spelling of names on the face of the warrant, the court held that the arresting officer was entitled to qualified immunity as a matter of law, saying: "[T]he arresting officer is entitled to the qualified immunity defense of a good faith belief that his behavior was proper."

[13] A. 20.

the court's conclusion that Respondent demonstrated the required intent and acts on the part of Petitioner is questionable. Accepting that the intent to confine and acts resulting in confinement need not include the specific intent "to deprive a person of a federal right,"[14] the intent and acts to confine "without a valid warrant"[15] would, nevertheless, be required. The deputies did intend to confine Respondent and did act to confine Respondent but it is clear that the deputies were acting pursuant to the warrant and thus had no intent to confine without a valid warrant.

Even if this Court treats the warrant as a nullity from a due process perspective, the evidence does not support the conclusion that Sheriff Baker intended or acted to confine Respondent. Obviously, Sheriff Baker, in executing his elected position, either implicitly or expressly authorized his deputies to execute the warrant. To then conclude, however, that as a result of this general authorization the Sheriff intended and acted to confine Respondent is contrary to the evidence.

No evidence exists that Petitioner Baker specifically intended Respondent to be arrested by the warrant. Conversely, affirmative evidence was presented that Petitioner did not condone the arrest of Respondent and upon the

[14] *Monroe v. Pape*, 365 U.S. 167, 187 (1951).

[15] *Id. Monroe v. Pape*, did not do away with the requirement for intent to commit the wrongful act. In that case, a search was conducted without a warrant. The Court only suggested that the officers need not have a specific intent that the conduct violate a federal law. Here, the court is extending this concept to suggest that the officer need not have the intent to "arrest without a warrant" which was clearly not raised in *Monroe v. Pape*.

first knowledge that Respondent was the person arrested and confined, Petitioner acted immediately to secure his release.[16]

The court below founded its conclusion that the acts and intentions of the deputies should be attributed to Sheriff Baker upon *Jennings v. Patterson*[17] and *Rizzo v. Goode*.[18] The court's reliance on these cases is misplaced. In *Jennings*, the basis for attributing the acts complained of to an official was the full knowledge and acquiescence of the official in those very acts.[19] Similarly, it appeared in *Rizzo v. Goode*, that where an official is to be charged with the acts of subordinates, the official's own conduct must be such that the official can be charged as a participant.[20]

Thus, while citing cases suggesting another standard, the court below actually applied the doctrine of respondeat superior in order to recognize Respondent's prima facie case. This Court has recently held that a § 1983 action

[16] A. 65-68.

[17] 460 F.2d 1021 (5th Cir. 1971).

[18] 423 U.S. 362 (1976).

[19] 460 F.2d 1021, 1022 (5th Cir. 1972). In *Jennings v. Patterson*, the court was reviewing a dismissal of a complaint. With respect to the officials to whom the questioned conduct was to be attributed, the alleged conduct occurred "with the full knowledge and acquiescence" of the officials. The court was clearly dealing with an allegation that the officials had actual knowledge of the wrongful conduct. Here the wrongful conduct complained of was arrest without a warrant. Sheriff Baker was not shown to have known that the wrong man was to be arrested and thus could not have acquiesced in such conduct nor could the court have found the requisite intent to "arrest without a warrant" because there was a warrant.

[20] 423 U.S. 362 (1976). In *Rizzo v. Goode*, this Court also rejected the idea that a subordinate's act and intent can be attributed to his superiors merely because the subordinates have general authority to carry out their offices or more pertinent, because the superiors without actual knowledge have failed to institute a policy to prevent specific misfeasance on the part of the subordinates.

against a municipality cannot be founded solely upon this common law doctrine[21] but that liability should rest upon the acts of the individual defendant.[22] In reviewing the application of the respondeat superior doctrine to § 1983 cases, the court in *Jennings v. Davis*,[23] discussed its history as a "rule of policy" to deliberately allocate the risk of loss caused by employees to the employer who could be expected to respond in damages.[24] Thus there is no reason not to extend the *Monell* holding to cases involving sheriffs as well as municipalities.

The history and purpose of 42 U.S.C. § 1983 and its application by the Court would appear to require participation in the proscribed activity or, at a minimum, knowledge of and acquiescence in the proscribed activity. In *Rizzo v. Goode*,[25] this Court suggested the need for an "affirmative link" between the "misconduct and an adoption of any plan or policy" showing "authorization or approval" before officials would be charged with the acts of subordinates. If Sheriff Baker had previously been confronted with incidents of misidentification and had approved, acquiesced in, or simply ignored the incidents, such evidence might be

[21] *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 636 (1978).

[22] *Id.*

[23] 476 F.2d 1271 (8th Cir. 1973).

[24] Relying upon W. Prosser, Law of Torts the court in *Jennings v. Davis*, concluded that respondeat superior was based upon an economic policy rather than the suggestion that the master was a participant in the servant's act. The court said:

"The respondeat superior principle holds liable the 'innocent' master (with the infamous 'deep pocket') for the torts committed by his servant in the course of his employment." *Id.* at 1274.

[25] 423 U.S. 362, 371 (1976).

sufficient to suggest participation.[26] Here, the evidence is to the contrary. Immediately upon being notified that Respondent claimed he was not the person sought, Sheriff Baker investigated and effected the release of Respondent.

Petitioner's good faith and lack of any wrongful intent was further demonstrated by his conduct following this incident in that he thoroughly investigated and instituted new policies in an effort to prevent any recurrence.[27] As will be discussed hereafter, such conduct should not have been considered in determining whether Petitioner's acts were reasonable at the time of the arrest and confinement of Respondent,[28] but is certainly relevant to his intent and good faith.

Petitioner submits that there was no evidence that Respondent was deprived of liberty without due process of law. If, however, the warrant was insufficient to support the arrest and confinement in conformance with due process, good faith reliance upon the warrant impels the conclusion that the qualified immunity doctrine protected the Sheriff under these facts as a matter of law. Furthermore, the

[26] *Id. Rizzo v. Goode*, 423 U.S. 362 (1976) required at least an "affirmative link" between policy and questioned conduct; *Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 639 (1978) would require at least "official policy" inflicting the injury; and *Jennings v. Patterson*, 460 F.2d 1021 (5th Cir. 1972) would require knowledge and acquiescence. No such element of proof existed here.

[27] The testimony is clear. Sheriff Baker's revised policy was a result of this incident and of his investigation and efforts to prevent a recurrence. A. 52.

[28] Petitioner objected to the introduction of evidence concerning the investigation and change of policy after the incident. The objection was originally sustained (A. 51) but after a lengthy argument out of the presence of the jury, the court decided to admit the evidence (Tr. 62-67). Petitioner's objection and the irrelevancy of the evidence for the purposes suggested by the Fifth Circuit below is supported by Federal Rule of Evidence 407 and case authority. *See* footnote 50, *infra*.

Fifth Circuit erroneously concluded that Petitioner intended to and acted to wrongfully confine Respondent and thus erred in failing to affirm the directed verdict granted by the trial court.

II

A failure to act is not cognizable under 42 U.S.C. § 1983, absent proof of knowledge of the need to act at the time of the failure to act.

The court below in effect held that even if the arrest was proper and the acts of the deputies of Sheriff Baker were not attributable to him, Respondent was, nevertheless, entitled to have the jury answer the question of whether Petitioner had "caused" Respondent's confinement by a failure to have instituted alternative identification procedures at the time Respondent was arrested.[29] Concluding that such a failure was actionable, the court decided that the failure to have these policies created a fact issue concerning the reasonableness element of qualified immunity.[30] The "evidence" supporting Respondent's case and thwarting Petitioner's immunity defense was the same — the search for, and implementation of, new policies in an effort to prevent a recurrence.[31] In so holding, the court did not consider intent a necessary element. Thus, any action found would be based upon unintentional conduct or simple negligence. Furthermore, the negligence suggested by the court is of the passive variety because the

[29] Opinion below, A. 21.

[30] Opinion below, A. 22.

[31] The court noted only the evidence contained in the Sheriff's own testimony concerning his findings after the incident that other departments considered it reasonable to carry mug shots and fingerprint cards when executing a warrant for a person previously arrested, and his corresponding revision in policy. *See* opinion below, A. 22.

Sheriff's liability hinges on what he did not do rather than what he did.

A. Simple negligence alone should not support an action under 42 U.S.C. § 1983.

If simple negligence does not support a cause of action under § 1983, all other questions herein are irrelevant. Even if acts of the deputies are attributed to Sheriff Baker in the first analysis, it is clear that the confusion of the identities of Respondent and his brother Leonard could be characterized, at worst, as simple negligence. Furthermore, it is clear that if negligence does not state a cause of action under § 1983, qualified immunity exists as a matter of law.[32]

This Court said in *Monroe v. Pape*,[33] that 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." This falls short of stating a common law negligence standard for asserting claims under § 1983, particularly when measured against the facts before the the Court. The *Monroe* Court was reviewing a dismissal of a complaint alleging an unconstitutional search and arrest unsupported by a search warrant or an arrest

[32] Petitioner has not attempted to deal with the issue of burden of proof in considering the question of negligence. Nevertheless, if negligence is not actionable, to suggest that a defendant must demonstrate non-negligence to support qualified immunity is inconsistent. The courts have not considered §1983 in this context. Rather, there has been some indication of a burden on a Plaintiff to show affirmative acts and affirmative intent with the Defendant being allowed to defend by showing good faith and that it was not unreasonable to have formed the good faith belief that the actions were proper. These standards are not identical to traditional negligence standards of care or conduct. A holding that simple negligence was not actionable would not create significant problems with existing standards but would make clear that the qualified immunity doctrine is not based upon a showing of non-negligence as construed by the court below.

[33] 365 U.S. 167, 187 (1961).

warrant. The complaint alleged that the defendant police officers broke into plaintiff's home, searched the home and took plaintiff to the police station and detained him without charges, all without the benefit of legal process. In making the above quoted statement, the Court in *Monroe v. Pape*, was responding to defendant's contention that § 1983 required allegations that defendants had acted with a specific intent to deprive a person of a federal right."[34] In the context of the case, the Court did not do away with a requirement for intentional conduct, but only the requirement that one specifically intend to violate a federal right.[35]

To date this Court has not clearly stated whether simple negligence in the form of unintentional acts which directly or indirectly result in a deprivation of rights, states a cause of action under 42 U.S.C. § 1983. Recently this issue was before the Court in *Procunier v. Navarette*.[36] The Court decided the case by determining that the persons charged were entitled to immunity as a matter of law since the right involved had not been a recognized federally protected right. Chief Justice Burger dissented to the Court's failure to consider the issue here presented and indicated that he "would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to the constitutional claim is not liable for damages under § 1983."[37]

[34] *Id.*

[35] *See* discussion of *Monroe v. Pape* in *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) where the court said:

"The *Monroe* standard dealt with facts showing intentional conduct by police which they were legally bound to know would deprive Monroe of Constitutional rights. All that the 'tort liability' language of *Monroe* really establishes is that a specific intent to violate Constitutional rights of the Plaintiff is not required for a Section 1983 violation. . . ." *Id.* at 567.

[36] 434 U.S. 555, 55 L.Ed.2d 24 (1978).

[37] *Id.* 55 L.Ed. 2d at 34.

The adoption of the standard advocated by Chief Justice Burger or a similar standard would also be consistent with the Court's stated views in *Paul v. Davis*,[38] wherein the Court decried the use of § 1983 and the due process clause of the fourteenth amendment as "a font of tort law to be superimposed on whatever systems may already be administered by the states." [39]

That a clearly enunciated standard is needed is demonstrated by the conflicting decisions arising in the circuit courts. In the instant case, the court below suggests that a cause of action can be founded upon mere negligence which in turn causes, or is likely to cause, errors which will result in a deprivation of a right. Conversely, the Seventh Circuit in *Bonner v. Coughlin*,[40] concluded that § 1983 was not designed to redress cases of simple negligence. In its discussion of § 1983 the court stated the following:

> "Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under § 1983 might deter similar misconduct. On the other hand, extending the § 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently the majority of circuits hold that mere negligence does not state a claim under § 1983. [Footnote omitted] Otherwise the Federal courts would be inundated with state tort cases in the absence of Congressional intent to widen Federal jurisdiction so drastically."[41]

[38] 424 U.S. 693 (1976).
[39] *Id.* at 701.
[40] 545 F.2d 565 (7th Cir. 1976).
[41] *Id.* at 568.

Because Congressional intent was not clear, this Court should speak affirmatively on the issue, leaving Congress the option of remedying any misstatement of its intent. The weight of current authority suggests that negligence should not be the basis for a § 1983 action.[42] Furthermore, if the Court concludes that Congress did intend § 1983 to encompass unintentional acts amounting to no more than simple negligence, the federal courts will be called upon to review all internal operating procedures of every law enforcement agency each time an arrest, confinement or treatment is questioned to determine whether the defendant should have used better procedures under the circumstances.

B. A failure to act is not negligence absent knowledge requiring action.

In the event this Court determines that simple unintentional acts can pose colorable § 1983 claims, the conclusions of the court below are nevthertheless suspect. The actionable "conduct" of Petitioner was a failure to act rather than any affirmative conduct with respect to the Respondent. Certainly, there are compelling circumstances when a failure to respond is considered affirmative conduct. Where, as here, there is no evidence of any circumstance or knowledge existing at the time of the failure to act indicating a need for affirmative conduct, the failure to act should have no factual or legal import.

The Fifth Circuit held as follows:

> "The only real question in this case is whether the Sheriff's failure to introduce a policy of sending photographs and fingerprints or his failure to have someone on duty to check Plaintiff's identity upon his arrival or during his stay at Potter County jail was unreasonable."[43]

[42] *See* review of authorities in footnote 8 of *Bonner v. Coughlin*, 545 F.2d at 568.
[43] Opinion below, A. 21.

The court's frame of reference was the Petitioner's failure to make actual comparisons of Respondent with the mug shots and fingerprints contained in the files when Respondent was picked up in Dallas and delivered to the Potter County jail. The "evidence" indicating that such a policy should have been instituted was the occurrence itself and Sheriff Baker's subsequent efforts to prevent a recurrence.[44]

If simple negligence is to be actionable under § 1983, then traditional concepts of tort law should be applied. [45] Fundamental to a showing of negligence is a finding that the actor has a duty to act in a prescribed manner. Where the questioned conduct is affirmative action, simple negligence may flow from the general duty to act reasonably. Where the alleged negligent conduct is inaction, one must first find a duty owed by the nonacting party. Here that duty would presumably be to use reasonable care to identify persons named in a warrant for arrest. A breach of duty minimally requires proof that the method used was unreasonable.

This proof was missing herein. Rather, the court rested its conclusion on the premise that the failure to have a method not used might have been unreasonable, on the proof that the occurrence happened, and on its observation that Sheriff Baker instituted a policy to prevent its recurrence. Thus the court discerned no evidence, nor was any presented, to demonstrate that the method of identification

[44] *See* footnote 31, *supra.*

[45] Disregarding the special burden borne by a Plaintiff in a § 1983 action, Respondent has not posed a cause of action cognizable under prevailing common law false imprisonment standards, at least as applied in Texas. *See Workman v. Freeman*, 289 S.W.2d 910 (Tex. 1966) and *McBeath v. Campbell*, 12 S.W.2d 118 (Tex. Comm'n App. 1921, holding approved), which establish that liability of a Sheriff under these facts is incurred only when he learns of a wrongful incarceration and does nothing.

used at the time of Respondent's arrest and confinement was unreasonable or that Sheriff Baker then knew of a need for a new policy. Without discussing negligence, this Court has consistently exonerated officials for failing to act to change or implement policy when they could not be charged with actual knowledge of the likelihood of the unlawful acts at the time of the occurrence. [46] Certainly *Rizzo v. Goode*,[47] is consistent with this approach.

The rules of evidence preclude the admissability of corrective actions taken after the fact of an injury as evidence that the occurrence was the result of negligence.[48] In addition to having no logical bearing on the reasonableness of conduct, allowing subsequent policy adjustments to give rise to liability for past conduct would discourage officials from improving policies in response to past errors.[49]

[46] See, *e.g.*, *Butz v. Economou*, U.S. , 57 L.Ed.2d 895 (1978); *Procunier v. Navarette*, 434 U.S. 555, 55 L.Ed.2d 24 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976).

[47] 423 U.S. 362 (1976).

[48] *Fed. R. Evid.* 407. *See also Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 206 (1891) where this Court long ago said concerning evidence of changes in machinery after an accident:

> "[I]t is now settled, upon much consideration by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

The Court indicated further that policy reasons dictated such a rule as well. If the rule were otherwise, the person in authority would be reluctant to change a policy for fear it would suggest past error.

[49] *Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 206 (1891).

If the action taken after Respondent was released is not relevant, the only other evidence of "negligence" at the time of the event in question would be the event itself. Again, traditional tort concepts hold that proof of the event is not itself evidence of negligence[50] unless the circumstances are such to give rise to the doctrine of *res ipsa loquitur*.[51] That doctrine is not available here, however, because Respondent could not and did not demonstrate an inability to prove the causes in fact of the action.[52]

The tenuousness of the lower court's characterization of unreasonableness of the failure to act is further demonstrated when the factor of causation is brought into play. Only by using the "but for" standard of causation may the Sheriff's failure be said to have "subjected, or caused to be subjected" Respondent to a deprivation. It, thus, becomes apparent that Sheriff Baker is not being called to task for having an improper policy, "but for" failing to have another policy which might have prevented injury under the

[50] *Rankin v. Nash-Texas Co.*, 105 S.W.2d 195, 199 (Tex. Comm'n App. 1937, opinion adopted), stated the state common law rules as follows: "The occurrence of an accident, or a collision, is not of itself evidence of negligence." *See also Gulf Refining Co. v. Delavan*, 203 F.2d 769 (5th Cir. 1953).

[51] The doctrine of *res ipsa loquitur* arises only where defendant has sole control of the instrumentality causing the injury and the circumstances are such that the event would not ordinarily have occurred in the absence of negligence. *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex. 1975).

[52] In the instant case, the causes, in fact, leading to the event are known. Further, it is also known that Petitioner did not have control of all of the factors giving rise to the event. He did not control Respondent's brother who used a false identity nor control the issuance of the warrant. Under these circumstances, the cases consistently hold that the happening of the event is not evidence of negligence. *See, e.g., Gulf Refining Co. v. Delavan*, 203 F.2d 769 (5th Cir. 1953); *Mobil Chemical Co. v. Bell*, 517 S.W.2d 245 (Tex. 1975); *Robinson v. Crump*, 422 S.W.2d 536 (Tex Civ. App.—Houston [14th Dist.] 1967), writ ref'd n.r.e. per curiam, 427 S.W.2d 861 (Tex. 1968).

circumstances. If such causation is allowed to support a cause of action under § 1983, the results will be far more extensive than merely holding that simple negligence states a cause of action. For notwithstanding the ultimate good faith of the actor, the Court must examine what he might have done to have prevented such occurrence. If a potentially superior policy is perceived, then the actor will be deemed to have "caused" the injury because "but for" his failure to have the alternate policy, the injury would not have occurred.

This "but for" or indirect causation used by the lower court is not legal causation under normal tort law application. The chain of causation developed at trial included acts of Respondent's brother (Leonard McCollan) who obtained a duplicate of Respondent's driver's license with his (Leonard's) picture thereon, his act of holding himself out as Respondent, the surrender of a bond by Leonard's bondsman causing a warrant to be issued for "Linnie Carl McCollan", and the ultimate identification of Respondent as Linnie Carl McCollan, an identity he did not deny but admitted. Yet the failure to have had a particular policy created no more than a condition allowing the event to happen and was not, under general tort law, a legal cause of the happening.[53] To suggest that Respondent's incarceration was a forseeable consequence of the acts taken or not taken is unrealistic.

This analysis also makes clear that the Fifth Circuit is imposing a higher standard of care on the Sheriff than is associated with simple negligence. The standard is one

[53] One test of whether an act or omission can be considered as the legal or actionable cause of an injury is whether the injury is a reasonably forseeable consequence of the act or omission. *Carey v. Pure Distributing Corp.* 124 S.W.2d 847 (Tex. 1939); *Texas & P. Ry Co. v. Bigham*, 38 S.W. 162 (Tex. 1896).

of strict liability in tort and an absolute duty to use the highest standard of care requiring a Defendant to anticipate events and circumstances merely because the occurrence demonstrates that the event could happen.

Petitioner thus submits that simple negligence should not be the basis of § 1983 claims. In the event this Court concludes otherwise, it should nevertheless reverse the court below because the facts herein do not, as a matter of law, support the submission of a negligence issue.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, affirming the directed verdict granted Petitioner by the district court.

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